NO. SC83682

SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

NATHAN HAWKINS,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY, MISSOURI
TENTH JUDICIAL CIRCUIT, DIVISION 1
THE HONORABLE GLENN A. NORTON, JUDGE

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the appellant's convictions for one count of murder in the first degree, § 565.020,

RSMo 1994, and one count of armed criminal action, § 571.015, RSMo 1994, in the Circuit Court of Monroe County. The appellant was sentenced to life imprisonment without the possibility of parole in the Missouri Department of Corrections for murder and to life imprisonment for armed criminal action, the sentences to be served consecutively. After opinion by the Missouri Court of Appeals, Eastern District, this Court granted transfer pursuant to Rule 83.04. Therefore, jurisdiction lies in this Court. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The appellant, Nathan Hawkins, was charged with one count of murder in the first degree, § 565.020, RSMo 1994, and one count of armed criminal action, § 571.015, RSMo 1994 (L.F. 8-9). On August 2, 1999, the cause proceeded to trial in the Circuit Court of Monroe County, the Honorable Glenn Norton presiding

(Tr. 2:1).[1]

The appellant does not challenge the sufficiency of the evidence to sustain his convictions. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial: On November 9, 1998, Donald Smith, also known as Uncle Mo, was at his trailer home at 420 Dover in Monroe City (Tr. 1:160-61). That night, Eric Cooper, a friend of Smith's, was visiting the home (Tr. 1:164). Cooper asked Smith if he could spend the night in the trailer and Smith agreed (Tr. 1:165). As such, Smith and Cooper spent the evening playing dominoes and listening to music (Tr. 1:165).

Later in the evening, the appellant, Smith's next door neighbor, also came by the trailer with Cindy Dowell and Jermaine Mayfield (Tr. 1:161-62, 2:205). At first, the appellant, Cooper, Dowell and Mayfield were just sitting in the trailer talking (Tr. 1:168). At some point, however, Dowell brought up an incident that had occurred approximately one year earlier involving an altercation between the appellant and Cooper (Tr. 1:169-70, 2:208-10). To avoid any trouble, Smith decided to take Cooper home (Tr. 1:169). Smith and Cooper then left the trailer and got in Dowell's car (Tr. 1:170, 172).

Shortly after Smith and Cooper left, the appellant also got up and went outside (Tr. 1:258). The appellant went around to the northwest corner of his own trailer and retrieved a gun he kept there (Tr. 1:337-38). He then walked up to the passenger side of the car where Cooper was sitting and shot him one time in the back of the head (Tr. 1:335-36). A few days after the shooting, Cooper died as a result of the gunshot to his head (Tr. 1:212-13, 220).

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[1] Citations to the trial transcript will be as follows: volume 1 (Tr. 1:pg. #); volume 2 (Tr. 2:pg .#); and sentencing (Tr. S:pg. #).

The appellant presented evidence and testified in his own behalf. He called several witnesses to testify that Cooper had threatened to "get" or to kill the appellant on several occasions prior to the shooting (Tr. 2:29-31, 57, 100-01, 126, 145-46, 188).

The appellant testified that he had seen Cooper and Smith going into Smith's trailer (Tr. 2:201). Because he wanted to resolve the tensions between Cooper and himself, the appellant also went over to Smith's trailer (Tr. 2:204-05). Because he was concerned for his safety, however, he took a gun with him to Smith's trailer (Tr. 2:248-49). The appellant further testified that after he, Dowell, and Jermaine Mayfield had arrived, Dowell brought up the earlier fight between himself and Cooper (Tr. 2:209). When this conversation became heated, Smith decided to take Cooper home and they left (Tr. 2:214). The appellant also testified that he decided to leave shortly after Cooper and Smith left because he felt he would be safer in his own home as Cooper had threatened to "take care of him" that night (Tr. 2:216, 218-19).

When the appellant went outside to go home, he saw that Cooper and Smith were still outside sitting in the car (Tr. 2:222). The appellant testified that Cooper was continuing to make threats toward him while sitting in the car and then reached behind him (Tr. 2:250-51). The appellant further testified that he took the gun out of his pocket, walked up to the car, reached over the open passenger door, and shot Cooper (Tr. 2:253-54).

At the close of the evidence, instructions, and argument of counsel, the jury returned its verdicts finding the appellant guilty as charged (Tr. 2:372, L.F. 79-80). As such, the trial court entered its judgment convicting the appellant of murder in the first degree and armed criminal action and sentencing him to life imprisonment without the possibility of parole in the Missouri Department of Corrections for murder and to life imprisonment for armed criminal action, the sentences to be served consecutively (L.F. 79-80).

This appeal follows.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT PLAINLY ERR IN SUBMITTING TO THE JURY INSTRUCTIONS NO. 5 AND 6, THE VERDICT DIRECTORS FOR MURDER IN THE FIRST AND SECOND DEGREES, BECAUSE ALTHOUGH THESE INSTRUCTIONS ERRONEOUSLY FAILED TO CROSS REFERENCE INSTRUCTION NO. 10, THE SELF-DEFENSE INSTRUCTION, THEY DID NOT CAUSE THE APPELLANT TO SUFFER MANIFEST INJUSTICE IN THAT THE INSTRUCTIONS DID NOT SO MISDIRECT THE JURY THAT IT IS APPARENT THAT THE ERRORS AFFECTED THE VERDICT.

State v. Beeler, 12 S.W.3d 254 (Mo. banc 2000);

State v. Graham, 916 S.W.2d 434 (Mo. App. E.D. 1996);

State v. Cooksey, 805 S.W.2d 709 (Mo. App. W.D. 1991);

State v. Dunlap, 706 S.W.2d 272 (Mo. App. E.D. 1986).

II.

THE TRIAL COURT DID NOT PLAINLY ERR IN SUBMITTING TO THE JURY INSTRUCTION NO. 6, THE VERDICT DIRECTOR FOR MURDER IN THE SECOND DEGREE, WHICH ERRONEOUSLY INCLUDED A PARAGRAPH ON SUDDEN PASSION BECAUSE THE APPELLANT DID NOT SUFFER MANIFEST PREJUDICE AS A RESULT OF THIS INSTRUCTION IN THAT THE APPELLANT WAS CONVICTED OF MURDER IN THE FIRST DEGREE AND IN THAT THE INSTRUCTION CORRECTLY STATED THE ELEMENTS OF MURDER IN THE SECOND DEGREE AND DID NOT PREVENT A CONVICTION OF SUCH OFFENSE.

State v. Beeler, 12 S.W.3d 254 (Mo. banc 2000);

State v. Hornbuckle, 769 S.W.2d 89 (Mo. banc), *cert. denied* 493 U.S. 860 (1989);

State v. Richards, 795 S.W.2d 428 (Mo. App. E.D. 1990);

State v. Livingston, 801 S.W.2d 344 (Mo. banc 1990);

Section 565.020, RSMo 1994;

Section 565.021, RSMo 1994.

III.

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE STATE'S EXHIBITS 28 AND 29, RAP LYRICS FOUND ON THE APPELLANT'S REFRIGERATOR DURING A SEARCH OF HIS TRAILER, BECAUSE THESE LYRICS WERE RELEVANT AND MATERIAL IN THAT THEY REBUTTED THE APPELLANT'S OWN TESTIMONY AS TO HIS PEACEABLE AND NON-VIOLENT NATURE. IN ANY EVENT, THE APPELLANT HAS FAILED TO ESTABLISH THAT HE WAS PREJUDICED BY THE ADMISSION OF THESE EXHIBITS AS THE EVIDENCE OF HIS GUILT WAS OVERWHELMING.

State v. Aye, 927 S.W.2d 951 (Mo. App. E.D. 1996);

State v. Martinelli, 927 S.W.2d 424 (Mo. App. E.D. 1998);

State v. Pierce, 932 S.W.2d 425 (Mo. App. E.D. 1996);

State v. Crump, 986 S.W.2d 180 (Mo. App. E.D. 1999);

Supreme Court Rule 30.27;

Supreme Court Rule 83.08.

IV.

THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS AND IN ADMITTING INTO EVIDENCE 9MM SHELL CASINGS AND RAP LYRICS FOUND IN THE APPELLANT'S TRAILER AND HIS STATEMENTS TO THE POLICE FOLLOWING HIS ARREST BECAUSE THE EVIDENCE AND STATEMENTS WERE PROCURED PURSUANT TO A VALID

WARRANT IN THAT THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE TO BELIEVE THAT EVIDENCE OF WRONGDOING WOULD BE FOUND IN THE APPELLANT'S TRAILER. FURTHER, ALTHOUGH THE RAP LYRICS WERE NOT LISTED AS AN ITEM TO BE SEIZED IN THE WARRANT THEY WERE LAWFULLY SEIZED AND ADMISSIBLE IN THAT THEY WERE IN PLAIN VIEW WHERE THE OFFICERS HAD A LAWFUL RIGHT TO BE.

MOREOVER, EVEN IF THE SEARCH WARRANT WAS NOT VALID THE SEIZED ITEMS WERE ADMISSIBLE UNDER THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE AND THE STATEMENTS WERE SUFFICIENTLY ATTENUATED FROM THE ALLEGEDLY ILLEGAL SEARCH.

IN ANY EVENT, THE APPELLANT HAS FAILED TO ESTABLISH THAT HE WAS PREJUDICED AS A RESULT OF THE ADMISSION OF THE EVIDENCE AND STATEMENTS RECOVERED AS A RESULT OF THE SEARCH.

State v. Blankenship, 830 S.W.2d 1 (Mo. banc 1992);

State v. Dawson, 985 S.W.2d 941 (Mo. App. W.D. 1999);

State v. Ard, 11 S.W.3d 820 (Mo. App. S.D. 2000);

State v. Brown, 708 S.W.2d 140 (Mo. banc 1986).

ARGUMENT

I.

THE TRIAL COURT DID NOT PLAINLY ERR IN SUBMITTING TO THE JURY INSTRUCTIONS NO. 5 AND 6, THE VERDICT DIRECTORS FOR MURDER IN THE FIRST AND SECOND DEGREES, BECAUSE ALTHOUGH THESE INSTRUCTIONS ERRONEOUSLY FAILED TO CROSS REFERENCE INSTRUCTION NO. 10, THE SELF-DEFENSE INSTRUCTION, THEY DID NOT CAUSE THE APPELLANT TO SUFFER MANIFEST INJUSTICE IN THAT THE INSTRUCTIONS DID NOT SO MISDIRECT THE JURY THAT IT IS APPARENT THAT THE ERRORS AFFECTED THE VERDICT.

In his first point on appeal, the appellant claims that the trial court plainly erred in giving Instructions No. 5 and 6, the verdict directors for murder in the first degree and murder in the second degree, to the jury (App. Sub. Br. 21). In making this claim, the appellant argues that the instructions did not follow the Missouri Approved Criminal Instructions in that both instructions failed to cross reference Instruction No. 10, his self defense instruction (App. Sub. Br. 21). He further argues that he was thereby prejudiced because the verdict directors purported to cover the entire case but ignored his theory of defense (App. Sub. Br. 21).

The appellant concedes that he did not object to Instructions No. 5 and 6 on the grounds asserted here and did not include this claim in his motion for new trial (App. Sub. Br. 27). As such, he requests plain error review pursuant to Supreme Court Rule 30.20 (App. Sub. Br. 27). Plain error review, however, should be used sparingly and should not be used to justify the review of every claim of error that has not been properly preserved for appellate review. State v. Fairow, 991 S.W.2d 712, 715 (Mo. App. E.D. 1999).

A claim should be reviewed for plain error only where it facially establishes grounds for believing that manifest injustice or a miscarriage of justice has resulted. Id. If the court exercises its discretion and reviews for plain error, the appellant has the burden of demonstrating not only that the trial court erred but that the error so substantially impacted upon his fundamental rights that manifest injustice or a miscarriage of justice will result if the error is left uncorrected. State v. Hornbuckle, 769 S.W.2d 89, 93 (Mo. banc), *cert. denied* 493 U.S. 860 (1989). "Relief under plain error, therefore, requires that appellant go beyond a mere showing of demonstrable prejudice to show manifest injustice affecting his substantial rights." Id. Further, for instructional error to rise to the level of plain error, it must be clear that the trial court so misdirected the jury or failed to instruct the jury that it is apparent that the error affected the verdict. State v. Beeler, 12 S.W.3d 294, 300 (Mo. banc 2000).

Here, the appellant claims that the trial court erred by failing to cross-reference his self defense instruction in the verdict directors for murder in the first degree and murder in the second degree as required by the Notes on Use to MAI-CR 304.02 and 306.06. The trial court submitted Instruction No. 5, the verdict director for murder in the first degree, which provided as follows:

> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about November 10, 1998, in the County of Monroe, State of Missouri, the defendant caused the death of Eric Cooper by shooting him with a handgun, and
>
> Second, that defendant knew that his conduct was practically certain to cause the

death of Eric Cooper, and

Third, that defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,

then you will find the defendant guilty under Count I of murder in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the first degree.

If you do find the defendant guilty under Count I of murder in the first degree, you are to assess and declare the punishment at imprisonment for life without eligibility for probation or parole.

(L.F. 47). The trial court also submitted Instruction No. 6, the verdict director for murder in the second degree, which provided as follows:

As to Count I, if you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 10, 1998, in the County of Monroe, State of Missouri, the defendant caused the death of Eric Cooper by shooting him with a handgun, and

Second, that defendant knew that his conduct was practically certain to cause the death of Eric Cooper, and

Third, that defendant did not do so under the influence of sudden passion arising from adequate cause,

then you will find the defendant guilty under Count I of murder in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt

each and all of these propositions, you must find the defendant not guilty of murder in the second degree.

As used in this instruction, the term "sudden passion" means passion directly caused by and arising out of provocation by Eric Cooper which passion arose at the time of the offense and was not solely the result of former provocation. The term "adequate cause" means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control.

If you do find the defendant guilty under Count I of murder in the second degree, you will assess and declare one of the following punishments:

1. Life imprisonment

2. Imprisonment for a term of years fixed by you, but not less than ten years and not to exceed thirty years.

(L.F. 48).

The appellant correctly asserts that the Notes on Use for MAI-CR3d 304.02 and 306.06 require the inclusion of language cross-referencing the verdict director where a special negative defense, such as self defense, is submitted to the jury. The verdict directors here admittedly did not do so.

Given the circumstances of this case, however, there is no reason to believe that the jury was misdirected by the instructions that were submitted or that the submitted instructions failed to adequately instruct the jury. This is because the jury was, in fact, provided with an instruction on self-defense (L.F. 52). The trial court gave the jury Instruction No. 10, an instruction on self defense submitted by the appellant, which provided as follows:

PART A

One of the issues in this case is whether the use of force by the defendant against Eric Cooper was in self-defense. In this state, the use of force including the use of deadly force to protect oneself from harm is lawful in certain situations.

In order for a person lawfully to use force in self-defense, he must reasonably believe he is in imminent danger of harm from the other person. He need not be in actual danger but he must have a reasonable belief that he is in such danger.

If he has such a belief, he is then permitted to use that amount of force that he reasonably believes to be necessary to protect himself.

But a person is not permitted to use deadly force, that is, force that he knows will create a substantial risk of causing death or serious physical injury, unless he reasonably believes he is in imminent danger of death or serious physical injury.

And even then, a person may use deadly force only if he reasonably believes the use of such force is necessary to protect himself.

As used in this instruction, the term "reasonable belief" means a belief based on reasonable grounds, that is, grounds which could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.

PART B

On the issue of self-defense in this case, you are instructed as follows:

If the defendant reasonably believed he was in imminent danger of death from the acts of Eric Cooper and he reasonably believed that the use of deadly force was necessary to defend himself, then he acted in lawful self-defense.

The State has the burden of proving beyond a reasonable doubt that the defendant

did not act in lawful self-defense. Unless you find beyond a reasonable doubt that the defendant did not act in lawful self-defense, you must find the defendant not guilty. As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious physical disfigurement or protracted loss or impairment.

(L.F. 52). This instruction clearly stated, even without a cross-reference in the verdict directors, that the jury could not find the appellant guilty unless it found, beyond a reasonable doubt, that he did not act in self-defense. The jury is presumed to read and follow all of the instructions submitted. State v. Graham, 916 S.W.2d 434, 436 (Mo. App. E.D. 1996). In light of this, it is impossible for the defendant to argue that a manifest injustice occurred.

The instant case is identical to State v. Cooksey, 805 S.W.2d 709, 710-11 (Mo. App. W.D. 1991), and State v. Dunlap, 706 S.W.2d 272, 277 (Mo. App. E.D. 1986). In each of those cases, the court found that the failure to cross reference a defense instruction was indeed error. Cooksey, 805 S.W.2d at 711; Dunlap, 706 S.W.2d at 277. However, in each of those cases, the court concluded that the defendant had failed to show that the error was so prejudicial as to rise to the level of plain error requiring reversal. Cooksey, 805 S.W.2d at 711; Dunlap, 706 S.W.2d at 277. In both cases, the court noted that defense counsel had argued their theories of defense in their closing arguments. Cooksey, 805 S.W.2d at 711; Dunlap, 706 S.W.2d at 277.

Here, the appellant's defense counsel specifically argued self-defense to the jury and specifically referenced Instruction No. 10 (Tr. 2:347-55). In this respect, a review of the transcript reveals that the appellant's defense counsel argued as follows:

The police asked him what happened. He said, I think it was the highway patrol, that

he shot Eric. He indicated to officer, to Sergeant Platte, he shot him because the guy was threatening him. Right?

...

Now, I'm going to go back to the technical stuff again here. This is instruction–my copy of Instruction No. 10. And you'll read this, this has to do with self-defense, and somewhere just above part B it says as used in this instruction, the term reasonable belief, in the same–reasonable belief means a belief based upon reasonable grounds, that is grounds which could lead a reasonable person in the same situation to the same belief. Whether that belief turned out to be true or false.

If it was reasonable for Nate to believe that this guy was about to kill him, not beat him up, not hurt him, not maim him, kill him, he always threatened to kill him, threatened to kill him if it was reasonable for him to believe that this guy was about to kill him, whether that belief turned out to be true or false.

Now, I want to point out another section in part B. There it states, now, you already know that the State has the burden of proving first degree murder. The burden, it's a burden, it's a, you know, it's a burden. That's the way the law is in the State of Missouri and all of the United States. Except maybe Texas.

The State has the burden–I'm reading part B–has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. The State has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Did not act. So that's two burdens.

Reasonable doubt. Unless you find beyond a reasonable doubt that the defendant did not act in lawful self-defense, you must find the defendant–you must–you must find the

> defendant not guilty. You must, and each and every one of you suggested to the Court–took an oath and told the Court you would follow these instructions.
>
> And I'm suggesting to you because you are the sole determiners of the facts and I'm only telling you the way I see it, and that is that the State has not met either of these burdens. There's reasonable doubt with respect to first degree murder, he's already thrown out his opinion with respect to second degree murder. And the State has not proved to you that it was not self-defense.

(Tr. 2:347, 349-52).

The prosecutor also specifically referenced Instruction No. 10 and discussed self defense in both his opening and closing arguments (Tr. 2:3338-39, 356-57). In this respect, the record reflects that the prosecutor made the following argument:

> That gentleman over there knows that Eric never ever in his whole life carried out a threat. He may have made a few. I don't know, you certainly can't believe this crew of witnesses, but he may have made a few, but he never ever carried them out. He never sought out the defendant, he never followed the defendant, he never cut him. He never did anything to the defendant, except perhaps if you choose to believe these witnesses, make a few threats.
>
> So take that Instruction No. 10, self-defense, and just toss it out of the way, because you know when you read it carefully there was no way he could have believed he was in eminent [sic] danger at the point that he came out of that house and went down to that car where he didn't belong. No way he could have believed he had to kill Eric when a weapon was never ever, ever seen, displayed, or shown. So throw away Instruction 10 and let's worry about not what wasn't there but what was.

...

This Instruction No. 10 is a self-defense instruction. It talks about reasonable people feeling like they had an eminent [sic] danger of substantial–of death. Eminent danger, reasonable people, death.

Now, that is not a he needed killing defense. The law does not recognize he needed killing as a reason to kill anybody. The law also does not recognize peremptory [sic] strikes. If one person just flat doesn't care for another person, or even if one person made a ton of threats against another person, you are not entitled by law to go out and kill them, to rub them out, to take them off the face of the earth. Only if you believe there is an immediate eminent [sic] threat to your life that can only be answered by use of a deadly weapon. And that's simply not here ladies and gentlemen.

(Tr. 2:338-39, 356).

These arguments by both the prosecutor and defense counsel made clear to the jury that it must find the appellant not guilty if it believed his claim of self-defense. No jury, having heard these arguments and read the instructions submitted here, which plainly set forth that the state was required to prove that the appellant did not act in self-defense, could have been confused into believing that it could convict the appellant of murder in the first degree even if it believed that he acted in self-defense. Although the appellant agues that the jury could have found him guilty before it ever considered self defense (App. Sub. Br. 29), he has failed to show in any way that the jury was either unaware of his self defense instruction or failed to use it in its deliberations. Cooksey, 805 S.W.2d at 711. As such, the failure to cross-reference the self defense instruction in the verdict directors for murder in the first and second degrees did not so misdirect the jury as to rise to the level

of plain error. Beeler, 12 S.W.3d at 300; Cooksey, 805 S.W.2d at 710-11; Dunlap, 706 S.W.2d at 277.[2]

Because it is not apparent from the record here that the error in failing to cross reference Instruction No. 10 in the verdict directors affected the jury's verdict, the appellant has failed to show that he suffered manifest injustice as a result of these instructions. Thus, the trial court did not plainly err in submitting Instructions 5 and 6 to the jury, and the appellant's first point on appeal must fail.

[2] The appellant cites three cases, State v. Cook, 727 S.W.2d 413 (Mo. App. W.D. 1987), State v. McClure, 632 S.W.2d 314 (Mo. App. S.D. 1982), and State v. Foster, 631 S.W.2d 672 (Mo. App. E.D. 1982), to support his claim that the failure to cross-reference his self defense instruction was reversible error. In all of these cases, however, the claims were properly preserved for review. Cook, 727 S.W.2d at 415, McClure, 632 S.W.2d at 316, Foster, 631 S.W.2d at 674. As such, the courts in those cases were reviewing for mere error, not plain error as this Court must do.

II.

THE TRIAL COURT DID NOT PLAINLY ERR IN SUBMITTING TO THE JURY INSTRUCTION NO. 6, THE VERDICT DIRECTOR FOR MURDER IN THE SECOND DEGREE, WHICH ERRONEOUSLY INCLUDED A PARAGRAPH ON SUDDEN PASSION BECAUSE THE APPELLANT DID NOT SUFFER MANIFEST PREJUDICE AS A RESULT OF THIS INSTRUCTION IN THAT THE APPELLANT WAS CONVICTED OF MURDER IN THE FIRST DEGREE AND IN THAT THE INSTRUCTION

CORRECTLY STATED THE ELEMENTS OF MURDER IN THE SECOND DEGREE AND DID NOT PREVENT A CONVICTION OF SUCH OFFENSE.

In his second point on appeal, the appellant claims that the trial court plainly erred in giving Instruction No. 6, the verdict director for murder in the second degree (App. Sub. Br. 30). In making this claim, he argues that the instruction included a paragraph requiring the jury to find that he did not act under the influence of sudden passion in killing Cooper although no instruction on voluntary manslaughter was given (App. Sub. Br. 30). He further argues that he was thereby prejudiced because the jury was confused by this instruction in light of the closing arguments of both the prosecutor and defense counsel which described murder in the second degree as a hot-blooded act (App. Sub. Br. 30).

The appellant concedes that he did not object to Instruction No. 6 on the grounds asserted here and did not include this claim in his motion for new trial (App. Sub. Br. 32). As such, he requests plain error review pursuant to Supreme Court Rule 30.20 (App. Sub. Br. 32). Plain error review, however, should be used sparingly and should not be used to justify the review of every claim of error that has not been properly preserved for appellate review. State v. Fairow, 991 S.W.2d 712, 715 (Mo. App. E.D. 1999).

A claim should be reviewed for plain error only where it facially establishes grounds for believing that manifest injustice or a miscarriage of justice has resulted. Id. If the court exercises its discretion and reviews for plain error, the appellant has the burden of demonstrating not only that the trial court erred but that the error so substantially impacted upon his fundamental rights that manifest injustice or a miscarriage of justice will result if the error is left uncorrected. State v. Hornbuckle, 769 S.W.2d 89, 93 (Mo. banc), *cert. denied* 493 U.S. 860 (1989). "Relief under plain error, therefore, requires that appellant go beyond a mere showing of demonstrable prejudice to show manifest injustice affecting his substantial rights." Id. Further, for instructional error to rise to the level of plain error, it must be clear that the trial court so misdirected the jury

or failed to instruct the jury that it is apparent that the error affected the verdict. State v. Beeler, 12 S.W.3d 294, 300 (Mo. banc 2000).

Here, the trial court submitted to the jury Instruction No. 6, the verdict director for murder in the second degree, which provided as follows:

> As to Count I, if you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree.
>
> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about November 10, 1998, in the County of Monroe, State of Missouri, the defendant caused the death of Eric Cooper by shooting him with a handgun, and
>
> Second, that defendant knew that his conduct was practically certain to cause the death of Eric Cooper, and
>
> Third, that defendant did not do so under the influence of sudden passion arising from adequate cause,
>
> then you will find the defendant guilty under Count I of murder in the second degree.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the second degree.
>
> As used in this instruction, the term "sudden passion" means passion directly caused by and arising out of provocation by Eric Cooper which passion arose at the time of the offense and was not solely the result of former provocation. The term "adequate cause" means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control.
>
> If you do find the defendant guilty under Count I of murder in the second degree, you

will assess and declare one of the following punishments:

1. Life imprisonment

2. Imprisonment for a term of years fixed by you, but not less than ten years and not to exceed thirty years.

(L.F. 48). The appellant claims that this instruction was erroneous due to the inclusion of the third paragraph which instructed the jury that it could only find him guilty of murder in the second degree if it found that he did not act under the influence of sudden passion (App. Sub. Br. 36). The appellant argues that this paragraph should be included in a second degree murder instruction only where an instruction on voluntary manslaughter is also submitted to the jury, which was not the case here (App. Sub. Br. 33). The appellant further argues that this instruction confused the jury, as evidenced by a note regarding this paragraph that it sent to the trial court during deliberations, and caused it to convict him of the higher offense, murder in the first degree (App. Sub. Br. 33).

It is well settled that a defendant cannot complain of instructional error relating to an offense for which he was not convicted. State v. Richards, 795 S.W.2d 428, 433 (Mo. App. E.D. 1990); State v. Blackmon, 664 S.W.2d 644, 650 (Mo. App. S.D. 1984); State v. Manning, 664 S.W.2d 605, 608 (Mo. App. E.D. 1984). This is because instructional error warrants reversal only where the defendant has been prejudiced. Richards, 795 S.W.2d at 433.

Here, the appellant was not convicted of murder in the second degree as submitted in Instruction No. 6. Rather, he was convicted of murder in the first degree as submitted in Instruction No. 5. As such, he is not entitled to complain about any error in Instruction No. 6, and his claim must fail. Richards, 795 S.W.2d at 433; Blackmon, 664 S.W.2d at 650; Manning, 664 S.W.2d at 608.

Even assuming, *arguendo*, that the appellant is entitled to complain of error in an instruction for an offense of which he was not convicted, he is still not entitled to any relief on his claim. This is because although Instruction No. 6 did erroneously include the sudden passion paragraph, it did not misstate the law of murder in the second degree or lessen the State's burden of proof. Rather, this instruction actually increased the State's burden by requiring it to prove a fact that was not an element of the crime. A jury instruction that puts an additional burden on the State beyond that which is legally required to establish guilt is not prejudicial to a defendant. State v. Livingston, 801 S.W.2d 344, 350 (Mo. banc 1990); see also State v. Strughold, 973 S.W.2d 876, 889 (Mo. App. E.D. 1998).

Further, while the instruction here did include an unnecessary paragraph, the instruction was still technically correct. The instruction correctly stated the law of murder in the second degree and correctly stated that the appellant committed this offense if he did not act under the influence of sudden passion. § 565.021, RSMo 1994. Moreover, although the appellant claims that both the prosecutor and defense counsel misstated the law by arguing that murder in the second degree was a hot-blooded act (App. Sub. Br. 30), these statements were, in fact, correct. The absence of deliberation, or cool reflection upon the matter for any length of time no matter how brief, is what separates murder in the first degree from murder in the second degree. §§ 565.020, 565.021, RSMo 1994. Thus, murder in the second degree can be a hot- blooded, spontaneous act as described by both the prosecutor and defense counsel (Tr. 2:336, 340, 344).

The appellant claims, however, that the jury was confused by the instruction here when read in light of the closing arguments of both the prosecutor and defense counsel wherein they argued that murder in the second degree was a hot-blooded act (Tr. 2:336, 340, 344). In making this claim, he points to a question sent by the jury to the trial court during deliberations in which the jury asked whether Instruction No. 6 was proper in stating that the appellant committed murder in the second degree if he was not acting under the influence of sudden passion when he killed Cooper (Supp. L.F. 1). In response, the trial court sent the jury a note

stating that it had to be guided by the instructions previously given (Tr. 2:370). The appellant claims that this question indicated that the jury was misled by the closing arguments and believed that murder in the second degree was equivalent to acting under the influence of sudden passion (App. Sub. Br. 36). The appellant further claims that the inclusion of the sudden passion paragraph in the second degree verdict director prevented the jury from convicting him of only murder in the second degree (App. Sub. Br. 36).

The note sent by the jury to the trial court here, however, did not indicate any confusion on the part of the jury when it decided the case. It merely indicated that the jury had carefully read and considered Instruction No. 6 and wanted to ensure that the language was correct. Moreover, even if the jury was confused by the instruction in light of the closing arguments, any such confusion was cured by the trial court's response to the question indicating that the instruction was a correct statement of the law and that the jury should by guided by that instruction. Nothing in that instruction prevented the jury from considering murder in the second degree.

In any event, the appellant has simply failed to show that he was prejudiced by the erroneous instruction. To convict the appellant of murder in the first degree, the jury necessarily had to find that found that he acted with deliberation, § 565.020, RSMo 1994, thereby rejecting any claim that he was guilty only of a hot-blooded killing or even a killing arising from sudden passion.

Further, although the failure to object to an instruction at trial does not preclude appellate review, the failure to object is a factor to be considered in determining prejudice. Livingston, 801 S.W.2d at 349. Here, not only did the appellant fail to object to Instruction No. 6 prior to its submission to the jury, he did not even object or attempt to correct the instruction when the error was made apparent by the jury's question (Tr. 2:322-31, 368-70). This shows that the appellant's defense counsel did not believe that the error in the verdict director was unduly prejudicial to the appellant under the circumstances of this case. Thus, it is clear that the instruction here did not so misdirect the jury as to rise to the level of plain error. Beeler, 12 S.W.3d at 300.

For these reasons, the trial court did not plainly err in submitting Instruction No. 6 to the jury, and the appellant's second point must fail.

III.

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE STATE'S EXHIBITS 28 AND 29, RAP LYRICS FOUND ON THE APPELLANT'S REFRIGERATOR DURING A SEARCH OF HIS TRAILER OR IN ALLOWING THE PROSECUTOR TO READ THESE LYRICS TO THE JURY BECAUSE

THE LYRICS WERE RELEVANT AND MATERIAL IN THAT THEY REBUTTED THE APPELLANT'S OWN TESTIMONY AS TO HIS PEACEABLE AND NON-VIOLENT NATURE. IN ANY EVENT, THE APPELLANT HAS FAILED TO ESTABLISH THAT HE WAS PREJUDICED BY THE ADMISSION OF THESE EXHIBITS AS THE EVIDENCE OF HIS GUILT WAS OVERWHELMING.

In his original brief filed in the Missouri Court of Appeals, Eastern District, the appellant claimed that the trial court erred in admitting into evidence and allowing the prosecutor to read State's Exhibits 28 and 29, rap lyrics found on the appellant's refrigerator during a search of his trailer (App. Br. 37). In making this claim, the appellant argued that the lyrics were irrelevant in that they did not rebut his testimony that he was a peaceable person (App. Br. 37). He further argued that the lyrics were unduly prejudicial due to their profane and violent content and may have caused the jury to convict him because he was bad person rather than because he was guilty of murder in the first degree (App. Br. 37).

A trial court is generally vested with broad discretion in the admission of evidence. State v. Hall, 982 S.W.2d 675, 680 (Mo. banc 1998), *cert. denied* 526 U.S. 1151 (1999); State v. Strughold, 973 S.W.2d 876, 887 (Mo. App. E.D. 1998). Absent a clear abuse of that discretion, this court should not interfere with its ruling. Strughold, 973 S.W.2d at 887. An abuse of discretion occurs only where the ruling of the trial court clearly offends the logic of the circumstances or appears arbitrary and unreasonable. Id.

A. Exhibits 28 and 29 Were Relevant to Rebut the Appellant's Testimony as to his Peaceable Nature

In claiming that the rap lyrics were irrelevant, the appellant argued that they had no tendency to prove any matter at issue and could not help the jury to determine any disputed fact (App. Br. 37). He further argued that the probative value of the rap lyrics was outweighed by their prejudicial effect in that the lyrics

contained obscene language and graphic descriptions of sex and violence (App. Br. 35-36). As such, he claimed that the rap lyrics were inadmissible (App. Br. 35). This claim is without merit.

At trial, the appellant testified in his own behalf and stated that he went to Smith's house on the night of the murder hoping to resolve a prior incident (Tr. 2:204-05). He also stated that fighting was not the way he normally resolved static or tension and that fighting was not the way that he went about things (Tr. 2:205). On cross examination, the appellant testified that whenever he is not getting along with someone he tries to make it better and tries to make peace (Tr. 2:272). On redirect, the appellant testified that he was more of a lover than a fighter (Tr. 2:299).

To rebut the appellant's testimony as to his peaceable nature and the way he intended to resolve the situation with Cooper, the prosecutor introduced into evidence State's Exhibits 28 and 29, handwritten rap lyrics that were hanging on the refrigerator in the appellant's trailer (Tr. 2:290-92). The prosecutor also read the lyrics to the jury (Tr. 2:292). The lyrics were as follows:

> You tried to fuck with my riches, that's why yo ass got took out. I kicked in yo doe nigga with my thing in my mouth cause we handle out business nigga from way down south and if you ain't about it nigga you less seen then a rain valley drout because the deer niggas ain't playing when they run over you with a strap and ain't talkin bullshit nigga down south we don't play around like that.
>
> We come fully equipped with AK's, Tec-9's and Mac 11's. I hope you prayed the night before cause you on a quick trip to heaven and if you think I'm playing nigga with this game that I spit I'll take your life nigga and be at your crip fuckin you bitch. So if you do now shit yet you don't fuck with the nigga riches or you'll end up in a pine box right along with those snitches riches, riches nigga what riches, you can't fuck with my riches.

(Tr. 2:292-93, State's Exhibits 28 and 29). In arguing that these exhibits were admissible, the prosecutor stated

that they represented a violent attitude toward life which contradicted the statements the appellant made on direct about being a peace-loving person (Tr. 2:289-90).

Generally, evidence is admissible if it is both logically and legally relevant. State v. Aye, 927 S.W.2d 951, 956 (Mo. App. E.D. 1996). Evidence is logically relevant if it tends to prove or disprove a fact in issue or if it corroborates evidence that is relevant and bears on a principal issue. Strughold, 973 S.W.2d at 887. Evidence is legally relevant when its probative value outweighs its prejudicial effect. State v. Evans, 992 S.W.2d 275, 287 (Mo. App. S.D. 1999).

Here, the appellant testified that he was a peaceful and non-violent person thereby placing his allegedly peaceful nature at issue. The fact that the appellant had rap lyrics espousing killing and violence hanging prominently on his refrigerator tended to refute this testimony. This fact also tended to prove that the appellant glorified violence and rebutted his testimony that he preferred to resolve difficulties peacefully. As such, the lyrics were logically relevant.

The probative value of the lyrics also outweighed their prejudicial effect. A review of the rap lyrics reveals that although they do contain obscene language and violent themes, they are largely nonsensical. It is difficult to see how the appellant was prejudiced by the introduction of these lyrics especially in light of the fact that he admitted that he shot and killed Cooper (Tr. 2:253-55). As such, the rap lyrics were also legally relevant. Thus, the trial court did not err in admitting into evidence State's Exhibits 28 and 29.

B. The Appellant Has Altered the Basis of His Claim

In his substitute brief filed in this Court, the appellant has raised for the first time the claim that the rap lyrics were inadmissible as they were evidence of specific acts or conduct (App. Sub. Br. 38). In making this claim, he argues that even if he put his reputation as a peaceable person at issue the State was allowed to rebut this testimony only with testimony as to his poor reputation for peacefulness (App. Sub. Br. 38). He further argues that the rap lyrics were evidence of uncharged misconduct that was unduly prejudicial (App.

Sub. Br. 41-42).

Supreme Court Rule 83.08(b), applicable to this case pursuant to Rule 30.27, authorizes the filing of substitute briefs in a case that has been transferred to this Court after opinion. The rule provides, in pertinent part, as follows:

> A party may file a substitute brief in this Court. The substitute brief shall conform with Rule 84.04, shall include all claims the party desires this Court to review, *shall not alter the basis of any claim that was raised in the court of appeals brief*, and shall not incorporate by reference any material from the court of appeals brief.

(Emphasis added). Here, a review of both the appellant's original and substitute briefs reveals that the appellant has made claims in this Court regarding the introduction of the rap lyrics which were not presented to the court of appeals. As such, he did, in fact, alter the basis of his claim that the trial court erred in admitting State's Exhibits 28 and 29 into evidence. Because the appellant has impermissibly altered the basis of his claims in his brief here, this Court should disregard the appellant's new claims and limit its review to the claims initially raised in the court of appeals. Supreme Court Rule 83.08(b).

Even if this court chooses to review the appellant's new claim that the rap lyrics were inadmissible because they were evidence of specific acts or conduct, the appellant is still not entitled to any relief. This is because where a defendant has injected an inadmissible issue into a case, the State is also allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by such issue. State v. Pierce, 932 S.W.2d 425, 431 (Mo. App. E.D. 1996).

In a murder trial, a defendant may show his good reputation only with evidence of his reputation in the community as a peaceable and law-abiding citizen. State v. Martinelli, 972 S.W.2d 424, 435 (Mo. App. E.D. 1998); see also State v. Manning, 682 S.W.2d 127, 130-31 (Mo. App. E.D. 1984); State v. Hayes, 295 S.W.2d 791, 793 (Mo. 1927). Here, the appellant did not merely present evidence as to his good reputation

in the community for peacefulness and non-violence. Rather, he injected the issue of his peaceful nature into the case by testifying specifically that he did not like to resolve problems with violence and that he went to Smith's trailer on the night of the murder to attempt to peacefully resolve a situation with Cooper (Tr. 2:204-05). This testimony was not relevant or admissible.

Because the appellant injected the issue of his peaceful nature into the case with inadmissible evidence, the State was allowed to counteract this testimony with otherwise inadmissible evidence. Pierce, 932 S.W.2d at 431. Moreover, because the appellant did not limit himself to evidence of his good reputation in the community, the State was likewise not restricted to only putting on evidence regarding his bad reputation. Thus, the trial court did not err in admitting into evidence State's Exhibits 28 and 29.

C. The Appellant Was Not Prejudiced by the Admission of the Lyrics

In any event, the appellant is simply not entitled to relief on his claims. This is because in matters involving the admission of evidence, an appellate court reviews not only for error but also for prejudice. State v. Crump, 986 S.W.2d 180, 188 (Mo. App. E.D. 1999). An appellate court should reverse a conviction based on a trial court's erroneous admission of evidence only if the error was so prejudicial that it deprived the defendant of a fair trial. Id. Such prejudice will only be found if there is a reasonable probability that in the absence of the erroneously admitted evidence, the verdict would have been different. State v. Hanway, 973 S.W.2d 892, 897 (Mo. App. W.D. 1998).

Here, the evidence of the appellant's guilt was overwhelming. At trial, the appellant admitted to shooting the victim (Tr. 2:253-55). The evidence showed that after the victim walked outside to go home, the appellant also went outside, retrieved a gun, walked up to the victim, and shot him in the head (Tr. 1:335-39). This evidence clearly established that the appellant knowingly killed the victim after deliberation. As such, the appellant has failed to show that the admission into evidence of the brief and largely nonsensical rap lyrics had any effect on the verdict or that he was thereby prejudiced. Crump, 986 S.W.2d at 188; Hanway, 973

S.W.2d at 897.

Because the rap lyrics were properly admitted to rebut the appellant's testimony as to his peace-loving nature, and in any event, the appellant failed to show that he was prejudiced by their admission, the trial court did not err in admitting the lyrics into evidence or in allowing the prosecutor to read them to the jury. Thus, the appellant's third point on appeal must fail.

IV.

THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS AND IN ADMITTING INTO EVIDENCE 9MM SHELL CASINGS AND RAP LYRICS FOUND IN THE APPELLANT'S TRAILER AND HIS STATEMENTS TO THE POLICE FOLLOWING HIS ARREST BECAUSE THE EVIDENCE AND STATEMENTS WERE PROCURED PURSUANT TO A VALID WARRANT IN THAT THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE TO BELIEVE THAT EVIDENCE OF WRONGDOING WOULD BE FOUND IN THE APPELLANT'S TRAILER. FURTHER, ALTHOUGH THE RAP LYRICS WERE NOT LISTED AS AN ITEM TO BE SEIZED IN THE WARRANT THEY WERE LAWFULLY SEIZED AND ADMISSIBLE IN THAT THEY WERE IN PLAIN VIEW WHERE THE OFFICERS HAD A LAWFUL RIGHT TO BE.

MOREOVER, EVEN IF THE SEARCH WARRANT WAS NOT VALID THE SEIZED ITEMS WERE ADMISSIBLE UNDER THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE AND THE STATEMENTS WERE SUFFICIENTLY ATTENUATED FROM THE ALLEGEDLY ILLEGAL SEARCH.

IN ANY EVENT, THE APPELLANT HAS FAILED TO ESTABLISH THAT HE WAS PREJUDICED AS A RESULT OF THE ADMISSION OF THE EVIDENCE AND STATEMENTS RECOVERED AS A RESULT OF THE SEARCH.

In his fourth point on appeal, the appellant claims that the trial court erred in overruling his motion to suppress and in admitting into evidence at trial 9mm shell casings and rap lyrics found in his trailer during a search pursuant to a warrant and statements he made to the police after his arrest (App. Sub. Br. 43). In making this claim, he argues that the affidavit offered in support of the application for the search warrant was insufficient to establish probable cause for the issuance of the warrant and that the search of his trailer was therefore illegal (App. Sub. Br. 43). He further argues that the statements he made to the police after his arrest were the fruit of this illegal search (App. Sub. Br. 43). The appellant also argues that even if the

warrant was valid, the seizure of the rap lyrics was not authorized by such warrant (App. Sub. Br. 43).

Appellate review of a claim regarding the denial of a motion to suppress is limited to determining whether the evidence is sufficient to support the trial court's ruling. State v. Burkhardt, 795 S.W.2d 399, 404 (Mo. banc 1990). In reviewing a trial court's ruling on a motion to suppress, the facts and any reasonable inferences arising therefrom are to be stated most favorably to the order challenged on appeal. State v. Blankenship, 830 SW.2d 1, 14 (Mo. banc 1992). "Evidence and inferences contrary to the order are to be disregarded." State v. Hutchinson, 796 S.W.2d 100, 104 (Mo. App. S.D. 1990).

A. The Issuance of the Search Warrant was Supported by Probable Cause

Because the question of whether probable cause existed for the issuance of a search warrant in a particular case is a question of fact, appellate review is not *de novo*. State v. Meyers, 992 S.W.2d 246, 248 (Mo. App. E.D. 1999). Rather, the task of the appellate court is to determine, from a review of the four corners of the application and supporting affidavits, whether the judge had a reasonable basis for concluding that probable cause existed. State v. Dawson, 985 S.W.2d 941, 948 (Mo. App. W.D. 1999). Great deference should be given to the issuing judge's decision and such decision should be reversed only upon a showing of a clear abuse of discretion and clear error. Id.

The appellant claims that the affidavit offered in support of the application for the search warrant here was insufficient to support the issuance of such warrant because it contained no information about the source of Sheriff Tawney's information and contained no information about the veracity or the basis of knowledge of the source of information (App. Sub. Br. 47-48). In making this claim, he argues that the facts stated in the affidavit were not based on Sheriff Tawney's personal observations but came from Officer Rick Stone of the Monroe City Police Department who gave the information to the sheriff (App. Sub. Br. 47-48). As such, the appellant argues that because the affidavit included hearsay, a substantial basis for

crediting the hearsay was required to be included in the affidavit but was not (App. Sub. Br. 47-48).

The appellant also claims that there was no information contained in the affidavit which would establish probable cause to believe that evidence of wrongdoing would be found in the trailer (App. Sub. Br. 48-49). In making this claim, the appellant argues that the affidavit merely alleged that he was seen near the scene of the shooting but did not allege that he was seen entering the trailer after the shooting (App. Sub. Br. 48-49). The appellant further argues that nothing in the affidavit provided any basis for believing that the appellant was in the trailer (App. Sub. Br. 48-49).

In determining whether a search warrant should be issued, a neutral judge must assess the totality of the circumstances to determine whether the application for the search warrant and its supporting affidavits demonstrate a fair probability that evidence of a crime will be found in the place sought to be searched. Dawson, 985 S.W.2d at 948. The State is not required to establish the presence of evidence of wrongdoing by a preponderance of the evidence or beyond a reasonable doubt. State v. Laws, 801 S.W.2d 68, 70 (Mo. banc 1990). Rather, the Fourth Amendment requires only that there be a substantial basis for believing that a search will uncover evidence of wrongdoing. State v. Woodworth, 941 S.W.2d 679, 695 (Mo. App. W.D. 1999). The presence or absence of probable cause is to be determined from a review of the four corners of the affidavits offered in support of the application for the search warrant and nothing else. Laws, 801 S.W.2d at 70.

The application for the search warrant issued here was supported by an affidavit filed by Sheriff Gary Tawney of the Monroe County Sheriff's Department (State's Exhibit 1). This affidavit provided as follows:

GARY L. TAWNEY, being of lawful age, first duly sworn and upon his oath does

depose and say that he has reason to believe that certain evidence of crime of ASSAULT IN THE FIRST DEGREE, to wit:

Ammunition and a hand gun, as well as clothing containing blood spattering, and paperwork indicating travel plans or an escape route/destination,

is being kept in a place described as:

A single wide house trailer rented by Nathan E. Hawkins, located at 414 E. Dover St. within Quinn's Trailer Park in Monroe City, Monroe County, Missouri, described more specifically as the third trailer East on Dover Street.

Affiant has reasonable grounds to believe the previously stated materials are being kept and secreted at the above-stated premises because of the following:

Your affiant, Sheriff Gary Tawney, has been a peace officer with Monroe County, Missouri for the past 16 years. He has been the elected Monroe County sheriff for six years.

On November 10, 1998, Nathaniel Hawkins allegedly shot Eric Cooper with a handgun at close range while Cooper sat in a motor vehicle parked between Cooper's trailer and Hawkins trailer, according to eyewitnesses. Cooper remains in critical condition.

A witness saw Hawkins flee from the scene. It is reasonable that he ran back into his residence, which was next to the scene of the shooting. Although affiant does not know that Hawkins is still in the trailer, it is also reasonable, based upon affiant's experience and

training that Hawkins may have exchanged clothing and may have left behind other evidence prior to fleeing his residence, such as the weapon, unused ammunition, spent casings, and maps or plans indicating an escape route or plan.

Affiant has obtained information indicating that no person other than Hawkins permanently resides at the above listed residence.

In order to properly obtain and preserve possible evidence, as well as to determine the location of Hawkins as soon as possible for questioning regarding the assault, any such evidence that may be found in the house should be obtained immediately.

(State's Exhibit 1).

In this affidavit, Sheriff Tawney states that the appellant was a suspect in the shooting of Eric Cooper based on information obtained from eyewitnesses to the shooting and witnesses who saw him running from the scene immediately after the shooting (State's Exhibit 1). Sheriff Tawney also stated that he had obtained information indicating that the appellant was the only permanent resident of the trailer sought to be searched (State's Exhibit 1). From this, it is clear that the information asserted in the affidavit came from witnesses who had personally observed the appellant committing the crime or fleeing the scene. As such, the basis of Sheriff Tawney's knowledge was sufficiently stated.

Further, although this knowledge was based on hearsay information, the information came from witnesses to the crime. "A citizen who purports to be the victim of, or to have witnessed, a crime is a reliable informant even though his or her reliability has not theretofore been proven or tested." State v. Ard, 11 S.W.3d 820, 828 (Mo. App. S.D. 2000). As such, the sheriff was not required to state grounds in the affidavit establishing the veracity of the witnesses. Thus, the affidavit was clearly sufficient to establish

probable cause for the issuance of the search warrant.

B. The Search was Nevertheless Valid Pursuant to the Good Faith Exception to the Exclusionary Rule

Even assuming, *arguendo*, that this affidavit was insufficient to support the issuance of the warrant, the appellant's claim would still fail under the "good faith exception" to the exclusionary rule created by United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and recognized by this Court in State v. Brown, 708 S.W.2d 140 (Mo. banc 1986). Leon holds that, where there is an objectively reasonable reliance upon a search warrant that is later found to be defective, the policies behind the exclusionary rule are not served by suppressing the evidence obtained as a result of the search. Leon, 468 U.S. at 922. The good faith exception is inapplicable only if (1) the affiant made statements in the affidavit that were knowingly false, (2) the reviewing judge did not act as a fair and impartial magistrate, (3) the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant was facially defective, as when it fails to specify the place to be searched or the items to be seized. Id. at 923.

As discussed above, the affidavit here set out that the appellant was a suspect in the shooting of Eric Cooper because of information received from eyewitnesses to the shooting and that Sheriff Tawney believed, based on his training and experience, that it was likely that the appellant returned to the trailer and left evidence regarding his crime behind. As such, the record does not support a finding that the executing officers lacked an objectively reasonable basis for believing the warrant was properly issued, that the issuing court was misled by information in the affidavit that the affiant knew to be false, that the issuing judge wholly abandoned his judicial role in finding probable cause, nor that the warrant itself was facially deficient. Id. Thus, the search of the appellant's trailer here was valid.

C. The Rap Lyrics Were Properly Seized

The appellant claims, however, that the rap lyrics seized in the search were improperly seized as they were not listed in the search warrant as an item to be seized (App. Br. 28). This claim is without merit. It is well settled that "[a] police officer engaged in lawful activity who observes a suspicious object in plain view may seize it immediately, and without a warrant." State v. Akers, 723 S.W.2d 9, 13 (Mo. App. W.D. 1986) (citation omitted). There are three requirements for a lawful plain view seizure: (1) the item must be plainly visible in a place where the officer has a lawful right to be, (2) the officer must have a lawful right of access to the item itself, and (3) the officer must have probable cause to believe that the item is evidence of a crime. Horton v. California, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); see also State v. Johnston, 957 S.W.2d 734, 742-43 (Mo. banc 1997), *cert. denied* 522 U.S. 1150 (1998). Probable cause in this context means that the incriminating character of the item be immediately apparent. Horton, 496 U.S. at 137.

Here, the officers who seized the rap lyrics were lawfully in the appellant's trailer pursuant to the search warrant when they noticed the lyrics stuck to the refrigerator door. Further, the incriminating nature of the lyrics is apparent because the appellant was suspected of shooting a young man in the head and the rap lyrics espoused killings and violence (Tr. 2:292-93). Thus, the seizure of the rap lyrics was proper.

D. The Appellant's Statements Were Not the Fruit of the Poisonous Tree

The appellant also claims that the statements he made following his arrest were inadmissible as the fruit of the poisonous tree (App. Sub. Br. 51-52). In making this claim, the appellant argues that because the search of his trailer was unconstitutional, the statements he made to the police upon his arrest were inadmissible (App. Sub. Br. 51-52). As discussed above, however, the search of the appellant's trailer was

legal and valid and the evidence recovered as a result thereof, including the appellant's statements, was properly admissible at trial.

Even if the search was invalid, however, the appellant's statements would still be admissible. This is because the statements were sufficiently attenuated from the search of the trailer. During the search, the police officers found a sonogram with the name of Marshal White on it (Tr. 1:330). The officers went to White's house where they found the appellant hiding under a bed and arrested him (Tr. 1:332-33). The appellant was given *Miranda* warnings at the time of his arrest and again at the Monroe City Police Station (Tr. 1:333, 337). The appellant then gave the statements at issue here, admitting to shooting Eric Cooper (Tr. 1:335-36, 337-39).

In determining whether evidence seized as a result of an illegal search should nevertheless be admissible at trial, the issue is whether the evidence to which objection has been made was recovered by exploiting the illegality of the search or instead by means sufficiently distinguishable to be purged of the primary taint. State v. Miller, 894 S.W.2d 649, 654 (Mo. banc 1995). Three factors should be considered in determining whether a confession retains the taint of an illegal search: (1) the temporal proximity of the search and the confession, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. Id. at 655.

Here, the search warrant was executed at approximately 7:30 a.m. (Tr. 1:307). The defendant was not located at Marshal White's house, however, until approximately 12:00 p.m. (Tr. 1:331). As such, there was a span of approximately four and a half hours between the time of the allegedly illegal search and the initial statements given by the appellant. Further, as discussed above, the officers conducting the search had a good faith belief that the search warrant that had been issued was valid and that the search was therefore

legal. As such, there was no flagrant misconduct. Moreover, the appellant was read his *Miranda* rights on two separate occasions (Tr. 1:333, 337). Although this alone is not a sufficient intervening circumstance to remove the taint of an illegal search, Miller, 894 S.W.2d 656-57, given the other circumstances in this case, it is clear that the appellant's statements were voluntary and sufficiently independent of the search here to be admissible.

E. The Appellant Has Failed to Demonstrate Prejudice

In any event, the appellant is not entitled to relief on his claim. This is because in matters involving the admission of evidence, an appellate court reviews not only for error but also for prejudice. State v. Crump, 986 S.W.2d 180, 188 (Mo. App. E.D. 1999). An appellate court should reverse a conviction based on a trial court's erroneous admission of evidence only if the error was so prejudicial that it deprived the defendant of a fair trial. Id. Such prejudice will only be found if there is a reasonable probability that in the absence of the erroneously admitted evidence, the verdict would have been different. State v. Hanway, 973 S.W.2d 892, 897 (Mo. App. W.D. 1998).

The only evidence admitted against the appellant that was recovered as a result of the search was two 9mm shell casings, the rap lyrics, and the statements he made to the police. The shell casings were mentioned only briefly and no testimony was offered that tied these shell casings to the weapon that was used in the murder of Eric Cooper (Tr. 1:308). Similarly, although the rap lyrics were read to the jury in an attempt to rebut the appellant's testimony as to his peaceful character as discussed in Point III, *infra*, this evidence was also brief and the lyrics themselves were largely nonsensical. As such, it is unlikely that the admission of either of these things had any effect at all on the jury's verdicts.

Further, the appellant testified at trial and admitted shooting and killing Eric Cooper (Tr. 2:228-29).

His only defense at trial was that he had done so in self-defense (Tr. 2:250-55). In fact, that the appellant was the person who shot Eric Cooper was never in dispute. The appellant also testified that he had planned to turn himself in even before he was arrested (Tr. 2:295). As such, even if he was arrested as a result of an illegal search, according to his own trial testimony, he would have gone to the police and admitted killing Eric Cooper in any event. Thus, it is clear that the appellant was not prejudiced by the admission of the statements he gave following his arrest.

For all of these reasons, the trial court did not err in overruling the appellant's motion to suppress and in admitting the challenged evidence at trial. Therefore, the appellant's final point on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that the appellant's convictions and sentences for murder in the first degree and armed criminal action should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 11,666 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 1st day of August, 2001, to:

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